



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

The Editorial Board of the Journal will meet at half-past four, Saturday afternoon, in the Library, near the F Street entrance of this hotel.

There should be an appointment of a nominating committee to suggest the name of some person suitable for election as honorary member for this year. The committee should report to the Executive Council at its meeting this afternoon. I do not recall how that committee is to be named. Is it your pleasure that the President shall name the committee?

A MEMBER. I move that that power be conferred upon the President.

Mr. Root. If there is no objection, the chair will exercise the power and name General Horace Porter, Hon John W. Foster, and Prof. N. Dwight Harris.

Members of the Society are urged to register at the desk in the rear of the room as early as possible, in order to secure their banquet tickets, and to obtain cards admitting them to the President's reception. It is necessary that the banquet tickets be secured at once, in order that the hotel may make preparations sufficient to cover the number who may come. These tickets must be secured to-day.

The topic for discussion this morning is: "Arbitration as a judicial remedy: an examination of concrete cases actually submitted and decided by arbitration: how far they are of a judicial character and how far they have been governed by diplomatic convenience."

The first speaker is Hon. John W. Foster.

ADDRESS OF MR. JOHN W. FOSTER,
OF WASHINGTON, D. C.

Mr. President and Gentlemen of the Society: For the discussion of this morning, I was called upon at a late date to act as a substitute for a gentleman of high standing and a jurist of repute, whom it was hoped would take part in the discussion; and the disappointment in that regard explains my presence on the floor.

In the discussion of the topic set down for the session of this morning, I have been assigned the task of considering the British-

American cases which have been submitted to arbitration, with a view to draw such lessons therefrom as their experience may suggest.

In the latitudinarian sense in which Benjamin Franklin declared to Joseph Quincy, in 1773, that "there never was a good war or a bad peace," we are justified in saying that the general results of arbitration between the two Anglo-Saxon nations have been beneficial. But we could hardly say they have been satisfactory. It is a fact of great moment that for nearly a hundred years our government has been able through the peaceful methods of diplomacy and arbitration to adjust all disputed questions with Great Britain, the country with which we have had, more than any other nation, the most intimate, intricate, important, and irritating relations. And, yet, when we come to examine the tribunals of arbitration created by these two countries we find that their decisions fall far short of the judicial character of our higher domestic tribunals, and that their proceedings are not marked by that impartial temper which we expect from our national courts of last resort.

The arbitration of the Venezuela boundary dispute was an Anglo-American submission in fact, although the seat of the controversy was in foreign territory. Two British and two American members, and one Russian as umpire or president, constituted the tribunal; the American members being Chief Justice Fuller and Justice Brewer of our Supreme Court. Ex-president Benjamin Harrison as senior counsel made the closing argument, and in the course of it he addressed the following appeal especially to the president of the tribunal, the Russian member:

Mr. President, it has been to me a matter of special interest that the President of this Tribunal, after his designation by these two contending nations for that high place, which assigned him the duty of participating in practical arbitration between nations, was called by his great sovereign to take part in a convention [the first peace conference at The Hague of 1899] which I believe will be accounted to be one of the greatest assemblies of the nations that the world has yet seen, not only in the personnel of those who are gathered together, but in the wide and widening effects which its resolutions are to have upon the intercourse of nations in the centuries to come.

And there was nothing, Mr. President, in your proceedings at

The Hague that so much attracted my approbation and interest as the proposition to constitute a permanent Court of Arbitration. It seems to me that, if this process of settling international difficulties is to commend itself to the nations, it can only be by setting up for the trial of such questions an absolutely impartial Tribunal. If conventions, if accommodations, and if the rule of give-and-take are to be used, then let the diplomatists settle the questions. But when these have failed in their work, it seems to me necessarily to imply the introduction of a judicial element into the Tribunal. * * * My thought is that the success of a general arbitration scheme turns upon the question: Is it possible to organize an international Tribunal upon that basis?

He then proceeded at some length to examine the spirit and functions of law which, he declared, "administered by just, impartial, and able judges, is the cornerstone upon which all domestic and social security and peace rest. This is especially brought home to us in this time when dissensions and distractions * * * come to disturb the nations." After quoting from Hooker's panegyric on law and Lord Stowell's declaration of the duty of a judge in all international questions, "not to deliver occasional and shifting opinions to serve present purposes, or particular national interests, but to administer with indifference that justice which the law of nations holds out without distinction to independent states;" Mr. Harrison then made a statement which I think it opportune to reproduce at this time when the British government is engaged in its fierce rivalry with Germany to maintain by predominance of force its supremacy on the seas. He said:

If I were to ask an intelligent Englishman today who had thoroughly imbibed the spirit of her great institutions, in what Great Britain's fame mostly consisted, and upon what it must depend, I think he would answer me that her glory was in the evolution of the system of the Common Law, and in the judicial tribunals which she has constituted to administer it; and not to be derived from the stricken field, so many of them the world around, where the Union Jack has been borne over vanquished foes.

With the instincts of a highly trained judicial mind and with the ardent devotion which some who hear me know he had for his

profession, the American lawyer in Paris pleaded with good reason for a high ideal for the tribunal then about to be created at The Hague, and for the application of the principles for which he contended by the international court before which he had brought his country's case. But his appeal proved to be without avail. The British and American members of the Court held to the positions taken by their respective governments, and the Russian umpire sought to find a middle ground which would be the least distasteful to his colleagues. He was not a lawyer by profession, but had received his training in the Russian foreign office, which had enjoyed the reputation of that high respect for judicial principles taught by Hooker and practiced by Stowell, and his decision was one of expediency and compromise. While it was largely in favor of the British contention, it was quietly understood at the time that it would have been even more in that direction but for the firm attitude of the American members.

The northwestern boundary arbitration as to the Canadian frontier line is another illustration of the failure of that method to secure a judicial determination of the question in controversy. For more than a generation after the treaty of peace and independence of 1783, which sought to accurately fix the boundary, the subject was a perennial cause of irritation and dispute, and after it had failed to yield to the efforts of diplomacy and commissions, it was submitted to the arbitration of the King of the Netherlands in 1828. At the end of three years he made an award, recommending a line which he did not claim was in conformity to the treaty, but was avowedly one of convenience or compromise. The government of the United States held that the decision was a departure from the terms of the submission, and upon the advice of the Senate and with the consent of Great Britain, the award was not accepted. The subject went back again into diplomacy and after ten years more of wrangling a settlement was reached through negotiation. In that settlement a compromise line had to be accepted, which was perfectly proper in diplomacy, but entirely out of place in a judicial submission.

One of the causes for the failure in so many instances to secure a judicial determination of questions submitted to arbitration, is the practice of the litigating governments in placing upon the tribunal as judges their own citizens or nationals. The Bering Sea or Fur-Seal arbitration of 1893 in Paris was one of the most august and able tribunals ever constituted between nations. The members of the court consisted of three of the first jurists of France, Italy, and Sweden, a member of the highest judiciary and a member of the Privy Council of Great Britain, and Mr. Justice Harlan and Senator Morgan as representatives of the United States. The American counsel were Messrs. E. J. Phelps, James C. Carter, Frederic R. Coudert and Judge Blodgett; and on the part of Great Britain Sir Charles Russell, Sir Richard Webster, both of whom afterwards held the post of Lord Chief Justice of England, and Mr. Christopher Robinson, the leader of the Canadian bar.

Mr. James C. Carter, at the time the recognized head of the New York bar and one of the ablest lawyers our country has produced, addressed a letter to the Secretary of State after the adjournment of the tribunal, containing his observations on the proceedings and results of that body. I feel that no apology is necessary if I make somewhat full extracts from that letter apropos of the subject we have under consideration. He writes:

In the first place, I am glad to be able to feel, more clearly now than ever before, that each and every of the Arbitrators has been actuated by a sincere desire to do what was just and right; and the attention which they exhibited towards counsel during the argument has been exceeded, if possible, by the devotion which they have manifested in their deliberations with each other. I do not think that a better body of men, in themselves considered, could have been selected. At the same time I imagine that the English Arbitrators on the one side, and the American on the other, have been as partisan in their feelings and their action as if they had been counsel. This we might have known from the start would be the case; but we have always indulged the illusion that they would, at least to some considerable extent, rise above the natural bias created by their position and perform the office of the judge. But this dream has not been realized. There is no contrivance and no situation which will make a man a suitable judge in his own case.

This circumstance of partnership in the members of the Tribunal has had an effect far other and greater than the simple one of disqualifying them from being judges. It has made it impossible for the neutral Arbitrators to be judges. To make a decision absolutely in favor of one side and absolutely against the other side, however the merits of the case might require it, could not but seem to be neutral Arbitrators as putting under their feet and humiliating men with whom they had sat for five months under the most friendly relations. This is almost too much to expect from men. Compromise of some sort seems to have been the necessity of the situation; and when this is said, it means that the Tribunal was no Court at all, but a body of men aiming to reach a solution which would either equally please, or equally displease, the contending parties. Our friend Judge Hoar of Massachusetts is said to have observed that the circumstances which he felt to be the most disagreeable to him in his official life was that he was never able to decide against both the parties. A place on the present Tribunal would have suited him to a charm.

After reviewing at some length the manner in which the tribunal disposed of the questions submitted, Mr. Carter continues his observations, as follows:

But how stands international law after this shaking up, and how stand the feasibility and expediency of international arbitration? These are important considerations, and, in the minds of some, more important than the material interest involved. In my judgment they have both been very seriously damaged. As for international law, the conclusion acted upon and established, so far as the action of this Tribunal could establish it, is that there is a chasm, impassable by a judicial tribunal, between what is morally and legally right; that international law accordingly is not a part of the science of morality, but constitutes a wholly different scheme, governed by some principle, God knows what; that when you have shown a thing to be right and that there is no law against it you have not gone far enough: you must still show that the proposition has at some time or other been received and adopted by the consent of nations, manifested, God knows how, as a part of international law. From which it follows that because you can not decide a thing to be right which is simply right without more, you must decide it to be wrong! A more erroneous or more degrading view of international law has, I venture to say, never been suggested.

Those who may think this award has been reached in the manner above described will regard it as very unfavorable to the prospects of international arbitration; but for my part I do not think it ought to have this effect. The result does not seriously impair my hope or confidence in the expediency of this method of settling many international disputes. The trouble has arisen from the manner in which the Tribunal was constituted and the form in which the questions submitted to it were made up. Nobody can be said to be at fault for this, because the circumstances could hardly have been foreseen. We have had no sufficient experience to guide us. But we now ought to know that the maxim that a party can not be a judge in his own cause finds no exception in international controversies. Courts at the best are very imperfect contrivances, and the best of judges are wholly useless as such if the conditions with which you surround them are not the most perfect that can be devised.

In making these observations, Mr. Carter may have had in mind the exhibition of partnership in that even greater arbitration tribunal at Geneva of 1872. The American member of that body, Charles Francis Adams, is credited with having acted with judicial composure and impartiality; but not so Sir Alexander Cockburn, Lord Chief Justice of England, the British member of the court. He openly avowed that he was "sitting on this tribunal as in some sense the representative of Great Britain;" and when criticised by public men in England for assuming such an attitude, a member of the cabinet approved his action in Parliament, by characterizing him as "the representative of the Crown, sent forth to discharge his duty to his Sovereign and maintain the honour of his country" — a declaration from which strong dissent was uttered, the assertion being made that the agent and counsel of Great Britain were the proper "defenders of the honour of the country, and that it would be a libel on the Lord Chief Justice to insinuate that he would undertake the office of going to Geneva nominally in the character of Arbitrator, but really to act as an advocate and plenipotentiary of this country."

And yet such was his conduct. Mr. Caleb Cushing, one of the American counsel, records that he "frequently in the course of the Conferences acted as a party agent rather than a judge" and at the adjournment refused to sign the award and created quite a scene, described by Mr. Cushing, as follows:

The instant that Count Sclopis [the president of the tribunal] closed, and before the sound of his last words had died on the ear, Sir Alexander Cockburn snatched up his hat, and, without participating in the exchange of leave-taking around him, without a word or sign of courteous recognition for any of his colleagues, rushed to the door and disappeared, in the manner of a criminal escaping from the dock, rather than of a judge separating, and that forever, from his colleagues of the Bench.

Other less conspicuous, but just as instructive, acts of partnership might be cited in commissions of arbitration where the United States has been a party. One other instance must suffice. In the claims commission with Mexico under the treaty of 1868, the American and Mexican commissioners so frequently disagreed, that at last it came to be the practice to send all cases to the umpire, Sir Edward Thornton, without even the trouble of preparing opinions. And yet, notwithstanding the many evidences of the unwisdom of the practice, I am sorry to see that the United States and Great Britain are persisting in placing on their tribunals of arbitration, even when sent to The Hague, representatives of their respective countries, as shown in the composition of the recent fisheries tribunal.

Another argument in favor of the creation of a permanent and impartial judicial tribunal drawn from the experience of the United States is in the conflicting interpretations of international law as announced by these numerous isolated courts or commissions. Sir Frederick Bruce, the British minister at Washington, was chosen to act as umpire between the United States and Colombia, and later Sir Edward Thornton as umpire between the United States and Mexico. And yet the decisions of these two British diplomats were in some cases based upon diametrically opposing principles.

But the most striking example of these conflicting opinions, claiming to be based on international law, was shown not long ago at Caracas. As a result of the intervention of the United States in the blockade of Venezuelan ports by certain of the European powers in 1902, ten separate arbitration commissions were organized to adjust the claims of that number of nations against Venezuela, and they held their sessions at Caracas almost concurrently. But they acted entirely independent of each other, and it was found after

the conclusion of their labors that a great contrariety of opinions had been rendered. In one of the commissions a claim was disallowed, as not warranted by international law. In another commission a claim of similar character was allowed. The nation, the claim of whose national had been rejected by the first commission, having a treaty with Venezuela stipulating for the treatment of "the most favored nation," made a demand upon Venezuela for the payment of the same on the ground that the claim of another national had been allowed by the second commission, and that its national was entitled to equally favorable treatment—certainly an extreme and novel application of the most favored nation treatment. And yet I have been informed, upon what I regard as good authority, that the demand made has been followed by an intimation that, if not allowed, it will be supported by a naval demonstration.

Another disadvantage arising from the non-existence of a permanent international judicial tribunal, to which all the nations may resort and secure a uniform and authoritative exposition of international law, is the fact that the nations who are parties to these independent arbitration commissions or courts regard their decisions as only binding upon them in the special cases submitted by them, and do not consider themselves as under any obligation to respect the principles announced in the awards in their future conduct. For example: A number of the Spanish American countries, as Mexico, Chili, Venezuela, etc., have provisions in their constitutions or laws which require that all foreigners who enter into contracts with or accept concessions from them shall not resort to diplomatic intervention for alleged violations, but must seek redress in the national tribunals and be governed by their decisions.

In arbitration commissions to which the United States has been a party, it has been decided repeatedly that a foreigner is bound by the laws above cited of the country with which he voluntarily enters into contractual relations, and that he is not entitled to maintain before an arbitration commission a suit for damages arising out of such contracts. And yet the government of the United States in its recent relations with Venezuela has disregarded this principle announced by arbitration commissions to which it was a party

and has caused the president of the country to be made an international outlaw. Hardly could it be possible to present a more urgent argument for the creation of an impartial and permanent international judicial tribunal, whose decisions would come to be accepted as correct principles of international law respected by all nations.

A further reason for the establishment of a permanent international arbitration tribunal may be found in the great expense which has attended the separate Anglo-American arbitrations. In such cases the entire expenses of the tribunals, including the compensation of the judges and other officers of the court, are borne in moities by the litigating governments. The Fur-Seal arbitration at Paris cost the United States alone the sum of \$230,000. The expense to the United States of the Alaskan Boundary tribunal at London, which was unusually brief in duration, covering only eight months, was \$100,000. Under the method now pursued at The Hague, in accordance with the existing treaty, the litigating parties have to bear the expense of the judges and other officials. It was stated during the last Peace Conference that no government could bring a case of any importance before a Hague tribunal without an expense of at least \$100,000. It will be seen at once that such a charge must be a serious impediment to a free resort to such a court by the smaller nations. Should a permanent tribunal be organized by the united action of the powers the cost of its maintenance would be met by a fund contributed by them, and the expenses of litigants in an arbitration at The Hague would be thereby largely reduced.

In closing this review of the American cases of arbitration and in pointing out the defects of the existing system, I would not have it understood that I condemn the general results of these arbitrations. As I said at the outset, they have been beneficial, and some of them have been governed by a spirit of impartiality and their decisions have been of a judicial character. But the defects of the system are so serious that they call for the reform to be found in a permanent international tribunal.

[General Porter here took the chair.]

The CHAIRMAN. Dr. Luis Anderson, the Secretary of Foreign Affairs of Costa Rica, has prepared a paper, which was to follow

the very admirable paper just read by Hon. John W. Foster; but as Dr. Anderson was not able to be present he has sent the paper to the Secretary of the Society, and it will be printed in the proceedings.¹

ADDRESS OF MR. LUIS ANDERSON,
OF COSTA RICA.

The savage kills the adversary who disputes what he believes his own; the civilized man takes his adversary before a tribunal. If nations act as the savages do, it is because there are no tribunals. Constitute tribunals, and the nations, guided by their primordial interest, will submit their disputes to them, instead of strangling one another in mutual strife. — EMILE LAVELEYE.

This thought of the great French writer tallies, in no mean degree, with the observation of the illustrious philosopher, Herbert Spencer: "The manifestation of justice is, and ought to be, in proportion to the development and excellence of the organism." Justice is, in fact, nothing more than the full and actual realization of right, by means of which alone every individual can receive what is his due, without the slightest limitation, and without the slightest addition. This is the principal road, perhaps the only road, to that lofty end, towards which civilization advances — the establishment of the reign of liberty and peace among individuals and among nations — liberty and peace, towards which the human spirit constantly aspires, and without which man would strive in vain to fulfill the high social mission for which Nature has fitted him.

Liberty and peace, then, are the chief end of civilization; and they can not be attained so long as right is outraged in any manner whatever. A transgression of right is a violation of the principles of liberty and peace; for it implies violence, which is contrary to liberty, and it incites resistance and rebellion, which are contrary to peace. Thus we see that Justice with her scales, balancing and distributing with rigid impartiality, is the chief factor in civilization.

In the present high stage of progress, when man has left behind him the long centuries of sickening wars, internecine feuds and

¹ The paper was not read at the meeting, but ordered printed, and is here given.

painful vicissitudes, when he has passed so many stages of evolutionary growth, from the days when, like inferior organisms, he satisfied his desires and settled his disputes by mere individual strength of limb, and made the earth "a world of plunder and prey," through all those later ages, when he practiced, under specious disguises, the same oppression and robbery, the time has come when reason is endeavoring to recognize justice as the only genuine mediator between the nations, when the powers must bring their disputes before the judgment-seat of arbitration, the same as individuals learnt, when the foundation-stone of present social life was laid, to appeal to the intervention of a third party, instead of having recourse to the strong hand, impelled too often by that "wild justice" which Bacon describes.

Man's development, in this respect, has been remarkably slow. From the spurious justice of the early ages, which, of course, was no justice at all, but individual and ruthless vindication of self, man passed, little by little, through the various stages of improvement, until a host of precedents, of arguments and considerations became the immediate basis for recognized codes, until legal tribunals were constituted, and recognized as trustworthy and irrefutable arbitrators between individuals. Thus society has reached its present state of excellence.

But, though there are good courts of appeal, and good codes of law for the affairs of individuals, there are none yet for the affairs of nations. Those political entities called nations, must, like individuals, subject themselves at times to the examinations and decisions of neutral tribunals. Like individuals, they have their particular prejudices, partialities, interests and idiosyncrasies; like individuals, they are liable to err grossly, and to confound right with wrong; and, like individuals, they outlive their wild, impulsive youth, and become capable of mature reflection.

It is true that there has been no mean progress in the history of international arbitration. When the first crude form of arbitration was established, it was the first step in the career of international justice; and, even a skeptical Heraclitus must admit that the arbitration of bygone eras, defective though it was, decided many intri-

cate cases more or less satisfactorily, thus avoiding ferocious conflicts, long years of fruitless discussions and of mutual animosities. Arbitration is now universally acknowledged to be necessary to the well-being of nations as well as of individuals; and, if we are not mistaken, the day is near when no civilized nation will appeal to arms before appealing to arbitration, for the natural tendency of mankind is towards liberty and peace; and it is absurd to think that national dignity and pride can reasonably be opposed to arbitration, for, as Carnazza Amari says: "States do not lower their dignity by appealing to arbitration: nobody lowers his honor by trying to establish the reign of justice and right."

Though the arbitration of the past centuries has been productive of much good, the beneficent effects of which are seen in every chapter of universal history, it is no less true that such arbitration is, in a great degree, unsuited to the exigencies of modern days. Judicial courts must now take the place of the old political system of arbitration; equity must take the place of statecraft; the dry light of logic must take the place of diplomacy.

Justice is not a conventional term, invented by mankind as a motive for maintaining social order, resolving all *mala in se* into nothing more than *mala prohibita*, and making "expediency" synonymous with "moral right." It is an absolute principle, the basis of national endeavors, and having all the intrinsic importance which Carlyle continually claimed for it. The walls of defense that justice has placed around every right, are, and must be considered, stronger than adamant. The voice of justice still says "Thou shalt" and "Thou shalt not," and she brooks no sort of compromise whatever. He that claims an inch too much, and he that cedes an inch too little, are equally condemned by her inexorable code; nor can human ingenuity invent a way to elude her searching eye, or perplex her lucid mind.

It must be remembered, furthermore, that an arbitrator, apart from his purely intellectual duties, apart from the circumstance that his interest should be connected with his virtue, to use the felicitous language of Alexander Hamilton, should certainly have an instinctive understanding of the feelings and opinions of all parties, a

sympathy even with the most insignificant of them, a delicate tact in doing stern justice, with as little hurt as possible to the susceptibilities of others. This often places him in a very trying position; and, it is not at all impossible for a very wise decision coming from a very clear-headed arbitrator, to be given with so little tact, that it inflames anew the passions of one or more of the disputants, opens fresh questions, re-opens closed ones, and even leads to very unexpected and very disagreeable consequences. A decision from a judicial tribunal is exposed to no such risk. Nations, like individuals, are always disposed to pay far more respect to the final decision of a legal arbitrator than to the opinion of one who only assumes judicial functions for the nonce. The one speaks with the prerogative of a judge whose uprightness is generally acknowledged; the other speaks merely as a disinterested person, whose uprightness is not so easily taken for granted. The decision of the one is understood to be based on knowledge and copious induction *ex aequo et bono*; the decision of the other is understood to be based on what to him appears equitable. The decision of the one has all the dignity of austere jurisdiction, and all the dignity of learning and of reason; the decision of the other may or may not have these claims to respect and confidence.

Robertson, the historian, speaking of European civilization in the twelfth century, says:

When the forms of legal proceedings were fixed, when the rules of decision were committed to writing, and collected into a body, law became a science, the knowledge of which required a regular course of study, together with long attention to the practice of courts. Martial and illiterate nobles had neither leisure nor inclination to undertake a task so laborious as well as so foreign from all the occupations which they deemed entertaining, or suitable to their rank. They gradually relinquished their places in courts of justice, where their ignorance exposed them to contempt. They became weary of listening to cases, which grew too intricate for them to comprehend. Not only the judicial determination of points which were the subject of controversy, but the conduct of all legal business transactions, was committed to persons *trained by previous study and application to the knowledge of law*. An order of men, to whom their

fellow-citizens had daily recourse for advice, and to whom they looked up for decision in their most important concerns, naturally acquired consideration and influence in society.

In the same manner, may some future historian, writing on the reform of arbitration in the twentieth century, point out that, when it was recognized that many questions of international interest required much judicial knowledge, much close study, and legal procedure, it became manifest that disputes between nations could no longer be settled by purely political or diplomatic persons, who, at times, destitute of the special qualifications required to deal with the questions, had neither the time nor the inclination necessary to acquire those qualifications. The Department of State at Washington speaks the language of wisdom in saying that "*international disputes ought to be settled by courts of publicists and jurists.*"

It is not without much complacency that we state, speaking of arbitration, that the Latin American nations have had recourse more frequently than other nations, to that civilized and humanitarian means of solving their difficulties, both in questions between themselves alone, and in questions between any of them and other powers. In the dawn of independence, those patriots who flung wide the gates of the new régime always had in mind the express understanding that all differences and controversies in Latin America should be settled by arbitration; and that noble hope and expectation of theirs, has been respected by their posterity. A South American writer has said, very justly: "If arbitration were not generally accepted as a fundamental principle of international law, it would still be recognized as such in Latin America." It is true that this great principle has been violated occasionally, and, in all probability, will be violated again; but it is no less true that this principle is as a torch which illumines international relations.

A recapitulation of all the Latin American cases that have been settled by arbitration, and an exhaustive examination of them, to find out in what particulars they were of a juridical character, and in what particulars they were of a diplomatic character, would be too extensive a task, beyond the limits of this paper. It will be quite sufficient, we think, to devote a few minutes' attention to some

cases, diverse in character, which have been dealt with; and it seems to us that this will give a correct notion of the variety and importance of the questions, and of the manner in which the appointed High Judges discharged their arbitral functions.

No. 1. 1838. It happened that a few French subjects resident in Mexico, appealed to their government against the Mexican Republic, for damages which, as they alleged, had been suffered by them, when the country was in a state of revolt. France demanded indemnification, which Mexico refused to give; whereupon a French fleet appeared in the Gulf of Mexico, and blockaded the town of Vera Cruz, Mexico, in retaliation, declared war, and expelled all French subjects resident in the country; and the French squadron immediately bombarded and took the fortress of San Juan de Ulúa.

To come to a settlement of the difficulties, and have some clear understanding as to indemnification or restitution mutually demanded, the two governments agreed to submit the matter to Her Majesty, Queen Victoria of Great Britain. In 1844, the arbitress, in a very brief sentence, declared that the acts of both France and Mexico, were legitimate, and that consequently neither the one nor the other had the right to any compensation whatever.

This sentence, not based, it is true, on any minute exposition of principles, nor on any profound juridical considerations, was yet, it is clear, inspired by an elevated and philanthropic spirit of statesmanship, and tended to establish peace between the two nations, without casting the shadow of an imputation on either. Notwithstanding the noble aims which inspired this award, we can not consider it as of a judicial character, having all the virtue which belongs to such decisions.

No. 2. 1821. At the time when the greater part of Latin America was in rebellion against Spain, an American ship from Canton, the *Macedonian*, laden with various classes of merchandise, arrived at Callao by permission of the Spanish Viceroy in Perú; but the captain, finding that the port was being blockaded by the Chilians, who, at war with the mother country, were also at war with the Peruvian royalists, obtained permission to steer for the port of Arica, where he disembarked and sold his merchandise. The money

got by the sales, was entrusted to some officer to be carried to Arequipa by land; but Chilian troops happened to meet the bearer, whom they attacked and robbed. Twenty years after, the government of Washington started a claim against Chili; and both governments agreed to submit the contention to His Majesty, the King of Belgium, authorizing him to investigate the facts and circumstances *ex aequo et bono*, and to decide definitely whether the claim, or any part of it, was just or not. The arbiter, after studying all the information that it was possible to gather, declared that the claim was just in part, and pointed out the exact amount of capital and of accumulated interest which Chili was bound to pay to the United States.

Considering the precision of the whole sentence, and especially the carefulness with which the arbiter showed the exact sum of money that one of the powers had to receive, it seems that the proceeding was strictly a legal one. His Majesty was acting with full powers *ex aequo et bono*; and it must be taken into account that much of the merchandise in the *Macedonian* belonged to Spanish subjects, that Chili was at war with Spain, represented by the Viceroy in Perú, and that, in order to arrive at a purely judicial decision, it was necessary to determine with exactitude, what amount of merchandise belonged to the subjects of each of the nations concerned, and so what indemnification or restitution was due to each. This was what the arbiter did, and his decision showed legal subtlety and judicial wisdom.

No. 3. 1864. In 1860, a British subject, Captain White, was arrested and imprisoned in Perú, on a charge of having attempted to assassinate the president of that country. There not being sufficient evidence to support the charge, he was released, but expelled from the country. Thereupon Great Britain demanded indemnification, and, as Perú considered the demand illegal, the case was submitted to the Senate of Hamburg. The arbiters, after studying the matter carefully, in the light of that legislation according to which the Peruvian government had acted, pronounced that they saw no irregularity in the conduct of Perú; and, it does not seem unreasonable to suppose that sufficient evidence was found to sustain the suspicion which the Peruvian authorities had harbored

against Captain White. Based, as the sentence was, on those laws of Perú which were applicable to the case, we must consider it a judicial one.

No. 4. 1870. When Montevideo, a port of Uruguay, was blockaded by the naval forces of the Argentine Republic, six trading-vessels of the British navy were refused entrance there. Great Britain claimed indemnification, and, the Argentine Republic refusing to give it, the contending powers submitted the question to the President of Chili. On the 1st of August, 1870, the arbiter declared, in accordance with the advice of the supreme court of his country, that the Argentine Republic was not bound to indemnify for the damages said to have been sustained by the aforesaid British subjects. Such a case, it is clear, does not require any minute investigation; the matter is simply explained by the circumstance that the countries Uruguay and the Argentine Republic were in a state of war, and that the declaration of the blockade of Montevideo had been made in due form. The arbiter merely had to bring to the case the test of international law. The rights of belligerents in such a case as this, are sustained, in very definite terms, by the law of nations. So that the decision of the president of Chili must be considered nothing else than a juridical sentence.

No. 5. 1872. On the 10th of July, 1872, a Peruvian bark, the *María Luz*, set sail from Macao, having on board 225 coolies, who, according to contract, as it was believed, were going to labor in Perú. The ship put by stress of weather into a Japanese port, where some of the coolies disembarked and escaped. As they affirmed, with the utmost solemnity, that they had been treated cruelly on board, and that they were being carried by force, the Japanese government instituted criminal proceedings against the captain, detained the ship, sold it, to avoid the expenses of keeping it, and deposited the price received, to be delivered to the owners, or others who were legally concerned. Perú claimed damages, and Japan refused to acknowledge the claim, protesting that her proceedings had all been just. The question was submitted to His Majesty, the Emperor of Russia, who declared, in his sentence of May, 1875, that the claim of Perú was altogether illegal.

We do not know what were the particular arguments which led to this decision; indeed, we are not aware whether the arbiter gave publicity to any, or not; but, considering the stories related of those days, in this connection, and many notorious occurrences in Perú especially, we can not but think that His Majesty's decision was a very just one. Some years before the *María Luz* affair, the virtuous indignation of many of the European nations was aroused against that slave-trade which was known in Latin America as "*la trata*," and wise and philanthropic statesmen declared uncompromising hostility against it. In this odious traffic, many natives of the African coasts were ensnared, and many were dragged forcibly, into ships, and were carried to the Spanish colonies to labor as slaves; and, it is to be borne in mind that this state of things existed many years after the titanic hand of immortal Lincoln had swept away from North American civilization the shackles and fetters and scourges of slavery. At the time of the seizure of the *María Luz* by the Japanese authorities, there was this sort of traffic in Perú; many men were being carried from eastern shores, to work like beasts of burden on Peruvian plantations, and on that railway which the government had recently undertaken to make. And, though it could not be proved that all the individuals taken to Perú, to serve the government and the landed aristocracy of that country, were forced to be nothing more than "hewers of wood and drawers of water," it seems almost certain that they could, with much reason, complain of rather harsh treatment, both on board ship and under the Peruvian farmers and overseers. Therefore it is that, though it may not be easy to show that the decision of His Majesty, the Emperor of Russia, was based on any very elaborate juridical investigation and exposition, yet we warmly commend it, as having been inspired by a high sense of justice, and a noble spirit of humanity. It is a decision, which, considering all the circumstances that called it forth, can not but be admired and respected by the common sense of mankind.

We will now cite a question, the final settlement of which, bears eloquent witness to the impartiality and sense of right which have always been such prominent characteristics of the international policy of the United States.

No. 6. 1881. It happened that in 1861, Captain Pelletier of the bark *William*, an American citizen, being found by the Haytian government to be guilty of trafficking in slaves, and of various piratical acts, was sentenced by that government to five years' imprisonment. After the expiration of this term, he brought a claim against Hayti, which the United States sustained. The matter was submitted to the Hon. Mr. William Strong, an old judge, who, it was agreed, should decide it in conformity with the principles of international law.

The text of the arbiter's sentence is not at hand; so that we do not know what arguments he used, and what reasons he gave; but it is certain that Hayti was condemned to pay the very respectable sum of 57,250 pounds sterling. She protested against this sentence, and the Hon. Mr. Bayard, Secretary of State, took the matter in hand himself, and made a thorough inquiry. In his sentence, he declared that Mr. Pelletier's claim was indefensible, that Hayti had been right in her condemnation of him, that the punishment of five years' imprisonment was out of all proportion to the enormity of the crimes committed, and he concluded saying that Pelletier was "so hateful a character, that no action, either judicial or diplomatic, could, with the slightest show of reason, be taken in his defense."

It is almost certain that superficial observers would consider the Hon. Mr. William Strong an unworthy judge. We are inclined to think that he was a conscientious arbiter, who had not all the necessary information to arrive at a just conclusion, and who, even while deciding unjustly, was acting in good faith. But it must be recorded, as a matter of fact, that the United States nobly repaired his error, through her able and wide-minded secretary of state, who dealt with the question in a spirit of exalted justice.

No. 7. 1892. Two American citizens, Oberlander and Messenger, complained to the government at Washington that they had suffered arbitrary imprisonment in Mexico, and had been otherwise ill-treated at the hands of the Mexican authorities, on the frontiers of California. The United States demanded indemnification, and, when Mexico declined to admit the justice of the demand, the question was submitted to arbitration, the two governments agreeing to

name as arbiter the minister plenipotentiary of the Argentine Republic in Spain. In his sentence, dated November 19, 1897, the arbiter declared that Mexico was not obliged to give indemnification of any sort, for the arbitrary imprisonment and other ill-treatment alleged to have been suffered by Oberlander and Messenger.

We are not acquainted with all the evidence on which the arguments and the decision were based; but it is certain that such complaints have often been made by foreigners in Latin America; and it is seldom indeed that the cause of all such alleged injustice is not to be found in political circumstances. Intestine strifes, which, unfortunately, have been, since the days of the independence, very frequent in tropical America, have very often, directly and indirectly, caused foreigners to cherish party feeling, to express sympathy for one candidate or another, to take active part in political campaigns, and even to bear arms in defense of policy or persons. It is natural that, whenever their opponents triumph, there should be unpleasant consequences, and it is not strange if, at times, personal liberty and other rights are violated. It is thus that foreigners in Latin America have often suffered; and, at such times, they ought to blame their own indiscretion, their expression of partialities and antipathies, in one way or another. Such cases, as we have said, have not at all been "few and far between;" indeed, their name is legion; and, though we do not assert that the matter of Oberlander and Messenger is one in point, we can not help intimating that nations ought to be extremely cautious how they deal with complaints about ill-treatment at the hands of foreign governments, seeing that such ill-treatment, especially in Latin America, has almost invariably been caused by the imprudence of the complainers themselves, who, forgetting the duties of neutrality, and, taking advantage of intestine strife, have perhaps even gone so far as to shoulder muskets, and march to the battlefield. Indeed, we believe, that such considerations were not forgotten by the arbiter in the case of Oberlander and Messenger. Every such question ought to be decided by a bench of judges; for, as we have already shown, there are more facilities for dealing with them judicially, than there are for a multitude of other international questions; and, it requires no "Daniel come to judgment," for a clear and logical decision to be attained.

The greater number of the Latin American cases which have been decided by arbitration, are, more or less, of the same character as those mentioned. They are questions of mere personal consideration. But there are others, which are far more grave in character, questions in which territorial rights and national honor are concerned, questions which require the most exquisite tact as well as the clearest judgment.

No. 9. 1853. General Juan Flores, ex-president of Ecuador, in trying to regain the presidential chair, invaded that country, with troops from Perú. He was defeated, and Ecuador, holding Perú responsible for the invasion, made reclamations. This caused many conferences, and continual discussion, until both governments decided, by treaty, to submit the matter to arbitration. The government of Chili was arbiter, and, in dealing with the case, showed so much tact in bringing both parties to an understanding, and in throwing oil on the troubled waters, that, while we admit that she certainly used more diplomatic than judicial means, we must say that, from a humanitarian point of view, her decision could hardly have been excelled.

There are many other Latin American questions of international character, some of which have already been decided, and all of which are of exceedingly grave importance, dealing with territorial rights, and touching national integrity.

The questions that deal with territorial rights in Latin America, are the most difficult to be settled. The *Royal Ordinances* of Spain extended and limited the jurisdiction of the colonial authorities, to suit the necessities of every hour, as it were; and at a period when a great deal of the territories was unexplored and unknown. Fortunately, no war has ever been caused in Latin America by a boundary question. Arbitration has not always decided these questions quite clearly and reasonably; but, there can be no doubt that, as they must all be settled according to the interpretation of the *Cédulas Reales*, and the other laws belonging to the Spanish jurisdiction, they can be fairly dealt with only by such judicial arbiters as are capable of interpreting those laws with perspicacity and precision. There is no Latin American country where such questions have not arisen;

and international jurisprudence presents us with a host of precedents and considerations.

In 1896, a question of boundary in the Argentine Republic and Chili, caused the good relations between the two nations to be deeply compromised, and the case was submitted to the government of His Britannic Majesty, who, according to agreement, had to decide in the character of *arbitro juris*. We will not enter into all the complicated particulars of the negotiations, but will only say that the clear, logical, politic and, above all, juridical sentence of His Britannic Majesty, satisfied both parties, and led to a return of friendly feeling and mutual confidence between those two flourishing South American republics.

As a complement to His Britannic Majesty's sentence, was the sentence, equally noteworthy of Mr. Wm. I. Buchanan, minister of the United States in Buenos Aires, to whom the investigation and decision of a part of the claims had been intrusted.

In closing, we may state that the Central American Court of Justice, established in Cartago, Costa Rica, the first permanent Tribunal of International Justice ever heard of in the history of the world, in the month of December, 1908, pronounced judgment in the case brought by Honduras against Guatemala and El Salvador, for assistance which these latter countries were said to have given to revolutionists against her, and for other violations of neutrality. The Court of Justice gave the sentence as any court of appeal would give a judgment on the merits of an ordinary case. The limits of our space do not permit us to enter into the details of the affair;¹ so we will content ourselves with saying that the sentence pronounced by the court — a sentence strictly judicial — has saved the three republics of Honduras, Guatemala, and El Salvador from the scourge of a new war; it is like the first ray that heralds the dawn of the grand future, and the happy realization of the great humanitarian thought that inspired the establishment of that international tribunal. The Central American Court of Justice will be, let us hope, the root of a new system of international law, based, not on that political expedience which too often depends on every breeze

¹ See the AMERICAN JOURNAL OF INTERNATIONAL LAW, 3:729 (July, 1909).

of popular sympathy, and every gale of party feeling, but on those immutable principles of justice and truth, which, firm as a rock, bid defiance to all the storms and surges of time.

I will not take up more of the valuable time of my distinguished colleagues of the American Society of International Law, but will bring my observations to a close, affirming that the Latin American nations are not backward in this grand career towards liberty and right, that they, as well as their sisters, are proud to press onward, in the words of our able secretary, Mr. Scott, at the Hague conference, "*Vers la justice par la paix.*"

The CHAIRMAN (Mr. Porter). I have great pleasure now in calling upon a gentleman whose voice and whose uniformly serious demeanor we very much missed from Washington for the past year — the Hon. Wayne MacVeagh.

ADDRESS OF MR. WAYNE MAC VEAGH,
OF WASHINGTON, D. C.

Mr. Chairman and Gentlemen: I have no paper prepared for you, because I thought, as has been the case, that the address of the president, always luminous and comprehensive, and the address of Mr. Foster, sure to resemble in these respects that of the president, would cover the ground assigned for this morning's discussion, and especially if we had had the paper which has not yet reached the secretary, but which I hope will reach him before the conclusion of your deliberations.

There is really nothing needing to be said in further support of the views so ably expressed by Senator Root and Mr. Foster. If there has been any note of dissatisfaction with what has been done in the way of occasional international arbitrations, it is of course very natural that such a note should be heard when such arbitrations are compared with the inestimable benefits which would be derived from a permanent judicial tribunal established by the leading nations of the world in permanent session at the Hague. But, after all, it seems to me we ought never to forget the inestimable benefits con-

ferred upon the world by the occasional arbitrations which have already taken place. Imperfect in their manner of formation, imperfect sometimes in the personnel of the arbitrators and lacking many essentials of a great court, they have still spread abroad everywhere the idea that arbitration is an adequate substitute for force; and I can not doubt they have already prevented resorts to arms by great nations, which would have inflicted incalculable damage upon humanity. Of course, they have had their defects, and of course some of the defects are eminently clear — especially to the counsel who have not gained their causes — but I can not help thinking that in the case of Mr. Carter — whose letter you have heard — he had, as was his habit of mind, an undue prepossession in favor of his client. It was my unhappy fortune to engage in a discussion with Mr. Carter on a social occasion, just after, in recognition of his retainer by the government, he had completed his preliminary study of the case of the United States in the Bering Sea controversy; and I had the audacity to predict to him that every one of the points of our government in that case rested upon an unsound foundation, and that I had not the slightest doubt that a number of them would be disaffirmed by the unanimous judgment of the court, and everyone of them disaffirmed by a majority of its members. Well, really, you know, you can not blame international arbitration for the results in a case like that. Nor perhaps ought it to be blamed in a case like that of the Venezuelan boundary. That arbitration came up for a brief mention at the Hague when we were discussing the right of blockading nations to preference of payment. And in pointing out to the tribunal — on which Mr. De Martens sat, who was the umpire in the question of the Venezuelan boundary — I ventured to illustrate the danger of oppressing a small and a weak state by alluding to the fact that when her territory was at stake, as in that case, she was not allowed a single arbitrator upon the tribunal, although her powerful adversary was allowed two such arbitrators; and Mr. De Martens interrupted me to say that he thought that case did not justify my criticism, because, while Venezuela had no representative upon it, the United States had two

representatives upon it. To which I replied, "But the United States had nothing at stake in the controversy." "Well," he said, "no, but the representatives of the United States were representing Venezuela," and he added that he, as umpire, certainly was not conscious of any bias. I said, "No, but Venezuela may have been conscious of your bias." But consider what an immense blessing that arbitration conferred. Here was Great Britain, naturally spreading her civilization over Venezuela. That is an admirable process, and has worked well in many quarters of the globe, and therefore she naturally pursued it over here, but Venezuela as naturally protested that Great Britain ought not to extend the blessings of her civilization over Venezuelan territory without the assent of Venezuela. But the aggression continued year after year, until at last the United States, recognizing what Senator Root has so fully and eloquently explained on other occasions, our peculiar relations towards our weaker sister republics of the South, demanded an arbitration and at last the arbitration was conceded, and though an enormous portion of Venezuelan territory was given to Great Britain, still a firm and fast boundary was fixed, beyond which no such extension of British territory will ever be attempted.

And, so it seems to me, in the case of the arbitration at The Hague of the right of the blockading nation to preferential treatment, that, while much can be said in criticism of the tribunal, and especially of the conduct of Mr. Mouravieff who presided over it, and certainly much can be said as to the inaccuracy of its findings of fact as the basis for its decision, still, as I said then, when it was just over, and as I say now, such arbitration, was of inestimable benefit to the peace of the world. Here were three great nations, with their war ships in the Caribbean Sea, blockading the ports of a weak South American republic, and that blockade was lifted when the arbitration was agreed upon, and those ships went home, never, I trust, again to cross the sea on such an errand. The selection of arbitrators happened to be unwise — two Russian diplomats and one Austrian diplomat were not likely to regard with favor the protests of Venezuela against the masterful conduct of Great Britain and Germany. But it was infinitely better for the world and its

peace and its true prosperity that the question should be referred to such a tribunal — notwithstanding its mistakes of procedure, notwithstanding its mistakes in its findings of fact, notwithstanding its mistakes in its conclusions — infinitely better that it should be referred to the peaceful arbitrament of such a tribunal than that the United States should have been required, as she soon would have been required by the rising tide of indignation in the land, to order those fleets home. So I beg you to believe that among all the signs of a brighter day, among all the signs of the renaissance of the moral law, retaking its true place in the government of nations, no sign seems to me of better or brighter omen than the establishment of the court of arbitration at The Hague. With all its imperfections, with all its defects, it still stands there a signal to all peoples that here, in some halting, imperfect way, you can have a peaceful solution of your differences.

But that is no reason whatever for halting in our efforts to establish a far better tribunal, and the establishment of that tribunal can not be much longer delayed. I cherish the hope that it will in many ways follow the model of our own supreme court; and I would be glad to see its membership limited to the same number, chosen by some method of impartiality, the finding of which is not certainly beyond the ingenuity of the scholars and publicists interested in the work; and I would like to see it given a compensation adequate to its great dignity and importance, and not less than that accorded to the members of our own highest court. And then, I confess, instead of a limited tenure, I should vastly prefer that the jurists selected for its arduous labors of such world-wide scope and importance should hold their offices during their natural lives as our judges holds theirs. Such a tribunal, offering to every nation an opportunity for a judicial hearing and a judicial decision of every international dispute, would bring, in my judgment, within its jurisdiction almost every dispute which possibly can arise to vex the peace of the world.

The CHAIRMAN (Mr. Porter). The next paper will be presented by Prof. F. W. Aymar.

ADDRESS OF MR. F. W. AYMAR,
OF NEW YORK CITY.

Mr. Chairman, and Gentlemen of the Society: Arbitration is the sole judicial remedy employed by those juristic entities known as states, for the determination of controversies by international tribunals, judicial in their constitution and powers. Arbitration is not to be confounded with mediation; mediation is an advisory, arbitration a judicial, process. Mediation recommends, arbitration decides. The two processes are fundamentally different; while mediation is only one form of diplomacy, arbitration consists in the application of law, and of judicial investigation, into questions of fact to the determination of international disputes.

Negotiation of questions which must be finally settled by the adoption of a treaty, and not by the decision of the negotiators, is strictly diplomatic, not judicial.

Arbitration, like all other remedies, is founded upon rights, and has for its object the enforcement and protection of rights. It is because rights exist and because they are sometimes violated, that remedies are necessary. The term "remedy" is applied to the suit by means of which a right is protected. The suit may protect the right in three ways, namely, by compelling a specific reparation of it, when it has been violated, by preventing a violation of it, and by compelling a compensation in money for a violation of it. The term "remedy" is strictly applicable to only the second and third of these modes of protecting rights; for remedy literally means a cure—not a prevention. As commonly used in law, however, it means prevention, as well as cure; and it will be so used in this paper. All the rights of a state, as such, are included in the term sovereignty. In international law a state is considered sovereign, when it is organized for political purposes and permanently occupies a fixed territory.

States may enter into contracts with each other, and thus create new rights of a relative character. These rights add nothing to the sum of sovereign rights. What is granted by convention to one state, is equal to what is taken from the other.

The violations of the absolute rights of states constitute torts, and the violation of conventional rights, are breaches of obligations.

The tribunals, which enforce and protect these rights, are voluntarily established by the states which are parties to the dispute. These courts of arbitration are usually either joint or mixed commissions. Their procedure is largely governed by the treaty, which provides for their appointment. In all cases, where the commission renders a final award, after a judicial investigation of all questions of fact, and applies to the facts found, the principles of international law, the remedy is judicial in its character. Where the decision is not mandatory and final, but merely advisory, calling for further action, and a new treaty, to fix the rights of the respective states, clearly such a decision is governed only by diplomatic convenience.

A brief examination of the treaties between Great Britain and the United States of America, in which arbitrations were provided for, tested by the foregoing principles, will show that in most of these cases that the remedy applied was judicial in its character.

The first attempt by the United States to arbitrate with Great Britain was under the treaty of 1794, commonly called the Jay Treaty, which provided for three arbitrations.

Article V of this treaty provided for a mixed commission, of three persons, which met at Halifax, Nova Scotia, on August 30, 1796, to consider the disputed boundary question, which arose under the treaty of peace.

The treaty of peace had designated the Eastern boundary of the United States as the "River St. Croix," running north from the Bay of Fundy. Such a river appeared on Mitchell's map of 1755, used by the negotiators of the treaty, but no river of this name was afterwards found. The commission held that the Schoodiac was the river intended by the name of the St. Croix. The award fixing the northeast boundary of the United States, was rendered at Providence, Rhode Island, on October 25, 1798.

Great Britain had claimed a large part of the territory, which the commission decided belonged to the United States, and Great Britain had been making grants of this land, and exercising other jurisdiction, within the United States, thereby violating the sovereignty of this country, and also violating the rights under the treaty

of peace. After an examination of the evidence, the commission made its award, settling the question which had been submitted, according to law and fact.

Article VI provided for a mixed commission of five persons, that met at Philadelphia, Penn., in May, 1797, to determine the compensation due to British subjects, who had been prevented from collecting their claims, in American courts. The treaty of peace had guaranteed to British subjects the right to proceed in the state courts, for property which had been confiscated during the war. The federal governments had no power to force the states to allow these claims, and this led to the insertion of a provision in the constitution, making treaties the supreme law of the land. After the adoption of this instrument, many states refused to give relief to this class of British creditors. The question before the commission was one of damages for a breach of the treaty. The total amount of the claims filed with the commission was about \$25,000,000. The examination of the claims began in January, 1798, and proceeded for eighteen months as rapidly as matters of routine, and other interruptions, would permit. Congress appropriated \$300,000 for the payment of the awards. Decisions had not all been unanimous and the American commissioners were dissatisfied with the attitude taken by one of the British commissioners and they finally withdrew. The matter was taken up by the state departments of the two governments and adjusted through the channels of diplomacy. A convention was concluded on January 8, 1802, annulling article VI of the treaty of 1794, and the United States agreed to pay Great Britain \$600,000. The final settlement was non-judicial, but wholly diplomatic.

Article VII provided for a mixed commission of five persons, which met in London on October 10, 1796. During the war between Great Britain and France, Great Britain complained that, in the course of the war, her subjects sustained loss and damage, by reason of the capture of their vessels and merchandise, taken within the limits and jurisdiction of the states, and brought into the ports of the same, or taken by vessels originally armed in the ports of the states. The United States claimed, that, because of the Orders in

Council, issued by Great Britain, directing the seizure and detention of vessels loaded with corn, flour, or meal, bound for any port in France, that its subjects suffered large losses. This tribunal made a very careful and accurate examination of the facts in each case, and passed upon many important questions of law, involving the rights of neutrals, contraband, and the finality of prize courts. The questions were largely matters of tort, for violations of sovereignty. The American claimants recovered \$11,650; the British claimants \$143,428.14. The final award was made in 1804. This remedy was judicial.

The treaty of Ghent, December 24, 1814, provided for three arbitrations. One related to certain islands in Passamaquoddy Bay, the second related to the northeastern boundary of the United States. The commissioners failed to agree, and each made a separate report to its own government, and finally in 1827 the points of difference were referred to the King of the Netherlands. His award was deemed to be advisory and both governments waived it. The third was to determine the northern boundary of the United States along the middle of the Great Lakes, and thence to the Lake of the Woods. These questions were not determined until the treaty of August 8, 1842, generally known as the Webster-Ashburton Treaty, and the boundary from the northwest angle of the Lake of the Woods to the Rocky Mountains under the treaty of 1846, was settled by a joint commission.

The questions under articles IV, V, VI, and VII of the treaty of Ghent were similar to those under the article V of the Jay Treaty — violations of sovereignty by the invasion of the territory of each by the other. The attempt to settle these disputes by judicial methods failed, excepting the arbitration under article IV, which finally passed upon the ownership of the islands in Passamaquoddy Bay. The commissioners examined various maps and evidences, and were only able to agree in part. No final award was made by them. The determination of the question was brought about by diplomacy, and the final fixing of the boundaries by the treaty of 1842.

A commission met in London, September 15, 1853, to adjust all claims between the two countries, under the treaty which was con-

cluded on February 8, 1853. The whole number of claims presented to the commission was 115. Of these, some of which embraced numerous items, 75 were against the United States and 40 against Great Britain. Of the American claims against Great Britain 12 were allowed, and 19 British claims were allowed against the United States. These claims related to the improper collection of customs duties, and wrongful seizure of vessels alleged to be engaged in the slave trade; one was for the capture of an American vessel by a British ship of war on March 15, 1815, when peace existed by the terms of the Treaty of Ghent at the place where the seizure occurred; Florida and Texas bond cases, and the case of Alexander McLeod, whose arrest and trial in New York was in connection with the destruction of the *Caroline*. The evidence, as well as the law, was determined by the commission in all of the 115 cases and the awards were final. The commission sat until January 15, 1855.

On May 8, 1871, a treaty was concluded between Great Britain and the United States, known as the treaty of Washington. This treaty provided for a court of arbitration, composed of five members, which was to sit at Geneva, Switzerland, and to decide the claims for damages by the United States. These claims were known as the "Alabama Claims."

The treaty provided that the following rules should govern the arbitrators in deciding these claims:

The neutral government is bound, first, to use diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been especially adapted, in whole or in part, within such jurisdiction, to warlike use. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

The arbitrators organized the Tribunal of Geneva on December 15, 1871. The agents of each government immediately filed their printed cases.

The United States claimed national direct and indirect damages, for the acts of the confederate cruisers which were allowed to fit out in British ports; for the loss of the transfer of the American merchant marine to the British flag; for the increased cost of marine insurance, and for the extra cost of putting down the rebellion. The arbitrators did not consider the claims for indirect damages to have any foundation in international law "for an award of compensation or computation for damages between nations;" and decided to exclude them. The cases of the *Florida*, *Alabama*, *Shenandoah*, and *Retribution* were each separately examined and decided. The award was that Great Britain did not use due diligence in the discharge of its neutral duties in the cases of the *Alabama* and the *Florida*, and also in the case of the *Shenandoah* from the time she left the port at Melbourne. All the other cases were found for Great Britain. Fifteen million five hundred thousand dollars was awarded to the United States for direct losses.

The thirty-fourth article of the Treaty of Washington appointed His Majesty, the German Emperor, sole arbitrator to decide where the forty-ninth parallel of north latitude intersects the middle of the channel which separates the continent from Vancouver's Island to the Pacific Ocean. Great Britain maintained, according to the treaty of 1846, that the line should run through the Rosario Straits. The United States insisted that it should run through the Canal de Haro. The award was made in favor of the United States on October 21, 1872.

The third arbitration under the Treaty of Washington met in Washington on September 26, 1871, to consider the "Civil War Claims" other than the Alabama Claims. This commission adjudicated 489 cases. All the United States claims were dismissed. The awards were in favor of Great Britain.

The fourth commission under the Treaty of Washington met at Halifax June 15, 1877, to consider the question of fisheries. It was asserted by Great Britain, but not admitted by the United

States, that greater privileges in connection with the right of fisheries had been given to the subjects of the United States than was granted to British subjects, and that Great Britain ought to have some compensation. The award was in favor of Great Britain for five million five hundred thousand dollars.

In all four of these arbitrations the cases decided were of a judicial nature, and the awards determined the cases.

On February 29, 1892, a treaty was signed between Great Britain and the United States, which provided that the questions which had arisen between the two governments "concerning the jurisdictional right of the United States in the waters of Bering's Sea, and concerning also the preservation of the fur seal in, or habitually resorting to, the said waters "should be submitted to a tribunal of seven arbitrators."

In deciding the matter submitted to the arbitrators, it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Bering's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Bering's Sea included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Bering's Sea were held and exclusively exercised by Russia after said treaty?

4. Did not all the rights of Russia as to jurisdiction, and as to the seal fisheries in Bering's Sea east of the water boundary, in the treaty between the United States and Russia of the 30th of March, 1867, pass unimpaired to the United States under that treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea when such seals are found outside the ordinary three-mile limit?

The arbitrators, in as far as they determined the various questions of law, rendered strictly a judicial decision. In as far as

they recommended and advised regulations in the nature of an international game law, their action was that of negotiators, and the question one of diplomacy.

The claims for damages by fishermen were submitted to a mixed commission.

The award, so far as jurisdiction is concerned, was against the United States.

It is submitted that in every case of a true arbitration, in which a court sits and hears evidence and applies either the rules of international law, or special rules previously agreed upon, the action of the arbitrators, when final, furnishes a judicial remedy.

The CHAIRMAN (Mr. Porter). The meeting is now open to general discussion, upon or in the neighborhood of the subject of these papers.

Mr. THEODORE P. ION, of Boston, Mass. Mr. President, I should like to ask a question. I should like to find out, if possible, the reasons why during the last peace conference a discrimination was made between great and small states in the selection of judges. I think Professor Scott was present there, and would be ready to give something about it. What was the foundation for it, and why was that discrimination made? Was it because the great states were afraid that their interests should be delegated or tried or judged by small states, or was it a want of confidence in the judges of small states? That is the point. I think it very important to know. I could not find out the exact reasons from my readings of the proceedings.

Mr. JAMES BROWN SCOTT, of Washington, D. C. If the gentleman has read the proceedings and has been unable to determine from them the underlying reason, I can furnish him no enlightenment, because the various powers represented at the conference did not take me into confidence any more regarding that matter than they took the conference into their confidence, as exhibited by the printed proceedings. I would, however, state for the United States, that the American delegation was in favor of any system of composing the international tribunal acceptable to the conference, or a majority

of the conference, whether the United States, by means of such method, would always be represented, would only be partially represented or might not be represented at all in the trial of a case in any international tribunal so constituted.

I would be very happy to answer Prof. Ion's question more in detail, because anybody can well suspect what the reasons were, (and the fact that he has asked the question shows that he has a suspicion himself) —

Mr. ION (interrupting). A very vague suspicion.

Mr. SCOTT. — were it not for the fact that to-morrow the question will be discussed by various speakers, and a full opportunity given to discuss the question of the equality or inequality of nations and the role that nations, large and small, might be expected to take in the composition of an international tribunal.

The CHAIRMAN (Mr. Porter). Has any other gentleman any other observations to make on the question of this morning's discussion?

This lack of discussion seems to be a very high evidence of the impartiality of arbitral tribunals that there is no one else here to swear at the court.

Mr. COUDERT. I move that the meeting adjourn.

The CHAIRMAN (Mr. Porter). If there is no objection, we will stand adjourned until 2 o'clock this afternoon.